STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH A. BANASZAK,

Plaintiff-Appellant,

v

NORTHWEST AIRLINES, INC.,

Defendant- Appellee,

and

OTIS ELEVATOR, CO., COUNTY OF WAYNE and HUNT CONSTRUCTION GROUP, INC.,

Defendants.

UNPUBLISHED
July 21, 2009

No. 263305
Wayne Circuit Court
LC No. 02-200211-NO

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant Northwest Airlines, Inc.'s ("NWA") renewed motion for summary disposition.[1] We reverse and remand for further proceedings.

[1] The trial court had previously granted Otis Elevator, Co.'s ("Otis") and Hunt Construction Group, Inc.'s ("Hunt") motions for summary disposition and entered a stipulated order dismissing the county of Wayne. Plaintiff's claim of appeal with respect to Otis was resolved in *Banaszak v Northwest Airlines, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 263305), rev'd 477 Mich 895 (2007). However, this Court stayed plaintiff's corresponding claim of appeal with respect to NWA in *Banaszak v Northwest Airlines, Inc*, unpublished order of the Court of Appeals, entered October 5, 2005 (Docket No. 263305), during the pendency of NWA's Chapter 11 bankruptcy proceedings. This Court reinstated the claim of appeal in *Banaszak v Northwest Airlines, Inc*, unpublished order of the Court of Appeals, entered November 6, 2008 (Docket No. 263305).

This case arises out of plaintiff's fall at the McNamara Terminal construction site. NWA occupied the premises and contracted with Otis to install moving walkways in the floor of the terminal. The moving walkways have holes at each end called wellways, where the motors and machinery are stored. When empty, the wellways are approximately 48 inches deep. Otis generally covered the wellways with one-inch thick aluminum plates. However, during construction, some of these plates were stolen or removed. Hunt, repeatedly alerted NWA regarding the hazards presented by these uncovered wellways. Following NWA's urging to address the matter, Otis endeavored to cover the wellways with plywood. Thereafter, plaintiff, an apprentice electrician for a subcontractor, State Group, crossed a plywood-covered wellway, her left leg broke through the plywood, and she fell on machinery that was housed in the wellway.

Plaintiff subsequently claimed that she suffered back pain and discomfort in her left leg. Among other claims against Otis, Hunt, and the county of Wayne, plaintiff alleged that NWA was liable for her damages under a premises liability theory. The trial court concluded that a genuine issue of material fact existed regarding this claim, denying NWA's motion for summary disposition, and this Court denied NWA's application for leave to appeal that decision. *Banaszak v Hunt Constr Group, Inc*, unpublished order of the Court of Appeals, entered October 1, 2003 (Docket No. 249455).

The trial court also permitted plaintiff to amend her complaint to include a contractor liability claim against NWA, and it later concluded that a genuine issue of material fact existed regarding NWA's retained control of the premises. Following our Supreme Court's opinion in *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004), NWA filed a renewed motion for summary disposition of the contractor liability claim because plaintiff did not previously establish that genuine issues of material fact existed regarding both NWA's retained control of the premises and the common work area doctrine. The trial court granted NWA's renewed motion, concluding that there was no high degree of risk to a significant number of workmen under the common work area doctrine. The trial court also dismissed plaintiff's remaining premises liability claim, blending in contractor liability concepts.

Plaintiff's first argument on appeal is that the trial court erred when it granted NWA's renewed motion for summary disposition of her contractor liability claim because there was no evidence of a high degree of risk to a significant number of workers. This Court reviews a trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or

denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999).

"At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ghaffari v Turner Constr Co,* 473 Mich 16, 20; 699 NW2d 687 (2005). In *Funk v Gen Motors Corp,* 392 Mich 91; 220 NW2d 641 (1974), our Supreme Court carved out an exception to the general rule of nonliability in circumstances involving construction projects, which exception is known as the "common work area doctrine." *Ormsby, supra* at 48, 53-54. The *Ormsby* Court set forth the elements of the doctrine:

> That is, for a general contractor to be held liable under the "common work area doctrine," a plaintiff must show that (1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Id.* at 54.]

The *Funk* Court also spoke of the "retained control doctrine." *Ormsby, supra* at 48. The common work area doctrine can be applied to property owners in order to hold them liable on the basis that the owners retained control over the property. *Id.* at 55. The *Ormsby* Court explained:

> Further, the "retained control doctrine" is a doctrine subordinate to the "common work area doctrine" and is not itself an exception to the general rule of nonliability. Rather, it simply stands for the proposition that when the *Funk* "common work area doctrine" would apply, and the property owner has sufficiently "retained control" over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor. Thus, the "retained control doctrine," in this context, means that if a property owner assumes the role of a general contractor, such owner assumes the unique duties and obligations of a general contractor. [*Ormsby, supra* at 49.]

A plaintiff's failure to satisfy any one of the elements of the common work area doctrine is fatal. *Id.* at 59.

In this case, the trial court found that the third element of the doctrine, i.e., existence of a high degree of risk to a significant number of workmen, was not shown as a matter of law with respect to the danger caused by placing the ¼ inch thick piece of plywood over the wellway. We find that there is a question of fact regarding whether a significant number of workman were exposed to the risk, given plaintiff's deposition testimony about persons who were near her and

who helped her out of the wellway at the time of the fall,[2] as well as testimony from others about workers who traversed the general area. We also conclude that reasonable minds could differ regarding whether a high degree of risk was presented by the hazard. There was evidence that the open wellways were often covered by aluminum plates and/or ½ to ¾ inch thick plywood, but the wellway into which plaintiff fell was covered by only a ¼ inch thick piece of plywood, which plywood was described as not being in "good condition." While there was some testimony that only a few inches of space existed between the plywood that broke and the machinery that was housed in the wellway, plaintiff testified that her left leg broke through the plywood and fell approximately two feet before she came down on some type of railing that looked like a railroad track. A witness to the accident also testified:

> *Q.* What did you see?
>
> *A.* I was standing adjacent to the opening in the floor where the plywood was, and she attempted to walk around me towards the stairs and the plywood collapsed and she fell into the pit.
>
> *Q.* What portion of her body fell in?
>
> *A.* Entire.
>
> *Q.* Up to her neck or past her head?
>
> *A.* Well, the whole, the pit wasn't deep enough that your head wouldn't be standing above the floor, but she went down and collapsed into it. She went down.
>
> *Q.* What was her initial reaction?
>
> *A.* She screamed.
>
> *Q.* What was your reaction to the scream?
>
> *A.* Well, I turned further around and tried to help her out. . . .
>
> *Q.* Was she able to get out under her own power?
>
> *A.* No. Two of us took her by the hands and kind of helped her out, pulled her out.

Accordingly, there was evidence that plaintiff fell two feet into the wellway and evidence that her entire body fell into the open space under the plywood, requiring others to pull her out of the wellway. Whether it was the hazard of falling onto housed machinery a few inches below the

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[2] Plaintiff herself identified three individuals who were with her when she fell and who observed the accident.

plywood or falling into a space that measured a couple of feet beneath the plywood, reasonable minds could differ regarding whether the plywood-covered wellway created a high degree of risk, especially considering that the fall began and ended very quickly and was totally unexpected, leaving no time to effectively brace against the fall. Summary dismissal was unwarranted.

Next, plaintiff maintains that her premises liability claim is viable even if her contractor liability claim failed. In *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 534; 542 NW2d 912 (1995), this Court held that "the theories of retained control and premises liability are separate theories." Plaintiff primarily relies upon *Hughes v PMG Building, Inc*, 227 Mich App 1; 574 NW2d 691 (1997). In that case, PMG Building was the premises owner and general contractor for three new homes. PMG Building hired a subcontractor to construct a porch overhang that extended two feet from one of homes. Later, the plaintiff's employer was hired to shingle the roof of that home. When the plaintiff stepped on the porch overhang to shingle it, it collapsed and he fell twenty feet. *Id.* at 3-4. This Court concluded that the plaintiff's contractor liability claim against PMG Building failed because the overhang was not a common work area. *Id.* at 6-7. Despite the failure of the contractor liability claim, this Court relied on *Butler* to conclude that the evidence created a genuine issue of material fact regarding the plaintiff's separate premises liability claim against PMG Building as an owner of the premises. *Id.* at 9-12. We also note the following passage by our Supreme Court in *Ghaffari*, *supra* at 23-24:

> In addition to the logical conflict noted above, we recognize that there are several critical distinctions between the two doctrines that demonstrate that they serve different objectives. First, our jurisprudence makes clear that the two doctrines are applicable in entirely different contexts. The open and obvious doctrine is specifically applicable to a premises possessor. The common work area doctrine, meanwhile, is not applicable to the premises possessor, but rather to a general contractor whose responsibility it is to coordinate the activities of an array of subcontractors.
>
> In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), this Court recognized the distinction inherent in these two contexts. In *Perkoviq*, the plaintiff worker was injured when he fell from the roof while painting a partially constructed house. He brought suit against the defendant, the owner and general contractor of the subdivision development, on both premises liability and contractor liability theories. In reversing the Court of Appeals conclusion that genuine issues of material fact existed regarding the plaintiff's premises liability claim, we observed:
>
> "The Court of Appeals seems to have confused general contractor liability with the liability of a possessor of premises. In explaining its conclusion that defendant could be liable on a premises liability theory, the Court used analysis that was irrelevant to that theory and would be applicable only to a claim against a general contractor. . . .
>
> The fact that defendant may have additional duties in its role as general contractor, however, does not alter the nature of the duties owed by virtue of its ownership of the premises."

> Thus, contrary to the Court of Appeals analysis, *Perkoviq* makes clear that different duties are owed under each doctrine, and that the legal analyses employed in the two contexts are distinct. [Citations omitted; omission in original.]

In light of *Ghaffari*, *Butler*, and *Hughes*, we conclude that the trial court erred when it dismissed plaintiff's premises liability claim by relying on the general rule of nonliability for property owners applicable to contractor liability claims, which potentially implicate the common work area doctrine.

Given the conclusion that plaintiff could bring a separate premises liability claim despite also pursuing her contractor liability claim under the common work area doctrine, the next question is whether a genuine issue of material fact existed regarding that claim. In this case, there is no dispute that plaintiff was an invitee because she was an apprentice of a subcontractor on the terminal construction. *Perkoviq*, *supra* at 14. An invitor's legal duty to an invitee is '"to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

NWA claims that plaintiff's premises liability claim fails because it had no notice that the plywood-covered wellway was a risk. Whether an invitee is owed a duty by an invitor hinges on whether the invitor had actual or constructive notice of the alleged hazardous condition. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). "Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful [invitor] to discover it." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979); see also *Clark, supra* at 419.

Viewing the evidence in a light most favorable to plaintiff, there is a genuine issue of material fact regarding whether NWA had notice of the risk of the plywood-covered wellway. NWA knew some wellways lacked coverings. As a result, NWA's project manager for the Otis contract inspected the terminal construction periodically to ensure Otis's compliance with the terms and conditions of their contract. We also note that concerns about wellway safety were repeatedly brought to NWA's attention. The evidence further suggests that the hazardous plywood was present for several days or a week before the accident. Notice can be inferred from NWA's failure to discover the damaged plywood during this time when it made related inspections.

NWA also claims that plaintiff's premises liability claim should have failed because the danger that the plywood covering the wellway would not support its traffic was an open and obvious risk. "'A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them . . . .'" *Bertrand, supra* at 610, quoting 2 Restatement Torts, 2d, § 343A(1), p 218. The duty owed to an invitee does not generally encompass removal of open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite

knowledge of it on behalf of the invitee. *Id.* Whether a particular danger is open and obvious is dependent on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger on casual inspection. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). In determining whether an alleged dangerous condition is open and obvious, such a determination focuses on the characteristics of a reasonably prudent person. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004).

Here, there is no evidence that it was obvious to invitees that the ¼ inch plywood covering the instant wellway was thinner than the ½ to ¾ inch plywood that Otis typically used to cover the wellways. Likewise, there was no evidence that invitees would have known if an aluminum plate was under the ¼ inch plywood to provide added support. Furthermore, plaintiff did not observe whether the plywood was damaged before she chose to walk on it. Arguably, the evidence suggests that there was some wearing on a corner of the plywood. Nevertheless, a State Group electrician, who observed this wearing prior to the accident, stated that plaintiff would not have known the safety issues involved with walking on plywood absent past experience with similar coverings. Moreover, plaintiff's expert, David Brayton, opined that it was reasonable for plaintiff to believe that she could walk on the plywood because MIOSHA and OSHA standards require that covers be able to withstand such traffic. In light of this evidence, summary dismissal under the open and obvious danger doctrine is inappropriate.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, having fully succeeded on appeal, is awarded taxable costs under MCR 7.219.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood